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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. A. WOODWORTH and B. D. ELLIOTT,
Appellants,

v.

TACOMA YACHT CLUB,
Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

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Proctors for Appellee

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COUNTER STATEMENT OF THE CASE

The TACOMA YACHT CLUB was and is a non-profit corporation, organized under the laws of the State of Washington, for the prime purpose of providing moorage to members at a minimum of expense, and with a maximum of convenience and social advantages. The By-Laws of the Yacht Club vested authority to govern the affairs of the membership in a Board of

Trustees; rules and regulations governing the operation and maintenance of the club and moorage were adopted by the Board of Trustees. (Tr. 121-123)

Regulations and conditions for wharfage had been adopted by the Board of Trustees of the Yacht Club which were in force at all times during the loss in questions here, and had been in force for many years. The application for membership form and the wharfage agreement contained an exculpatory clause relieving the Yacht Club for liability for damage to the members' property occurring on the premises of the Yacht Club (R-38. Ex. 2, 3, and 4) (Tr. 124-126). This agreement between the Yacht Club and its members had been a regulation of the Board of Trustees for many years. (Tr. 131-132)

The customary and usual method for the Yacht Club to notify its members of its operation was through the use of a bulletin board and a monthly publication sent to each member. (Tr. 123-124, R-38, Ex. 5).

THE TACOMA YACHT CLUB leased from the Metropolitan Park Board a boat basin, the entire area between a county ferry dock and the Tacoma Smelter. A portion of this area has a dock which was used, under agreement with the Yacht Club, as a public moorage by Charles Mojean, himself a Yacht Club member. The facilities are owned by the Yacht Club. (Tr. 11-12). (Tr. 88 ff).

The Appellants had moored at the Yacht Club their boathouse containing two yachts, WOOD-

WORTH's *Vaja*, and ELLIOTT's *Leilani*. During December, 1961, because of pile driving being done in the vicinity of the Appellant's moorage berth, the boathouse was moved to a temporary moorage on Mojean's float. The move was made after the members were notified in the monthly publication, *The Lubberline*. (Ex. 5). On December 14, 1961, the boathouse was moved by Yacht Club employees. On the night of December 16, 1961, the boathouse broke loose from its moorings in a high wind and was carried out into the bay where it broke up, causing the loss of the boathouse, damage to the yachts, and the loss of boat gear. The Appellants were partners in the ownership of the boathouse. (Tr. 53 ff, L. 23) (Tr. 71, L. 21).

The Appellants were both members of the Yacht Club, J. A. WOODWORTH since 1959 or 1960 (Tr. 41, L. 18-19), and B. D. ELLIOTT since 1932 (Tr. 72, L. 14). The latter had served as a Board of Trustees member and had helped write the rules and regulations pertaining to moorage (Tr. 8, L. 17-24).

Both WOODWORTH and ELLIOTT received the monthly publication regularly (Tr. 76, L. 22-23) (Tr. 50, L. 3-5). ELLIOTT knew that boathouses were being moved to temporary moorage when he attended a Coast Guard Auxiliary meeting at the Yacht Club about December 12th (Tr. 77, L. 8 ff). WOODWORTH knew the boathouse had been moved when he went fishing the day before the accident on December 16th and found his and ELLIOTT'S boathouse moored at Mojean's dock (Tr. 43, L. 17-24). WOODWORTH also

knew there was some work going on around the Yacht Club and knew why the boathouse was moved (Tr. 43, L. 20-24).

After receipt of *The Lubberline* and the discussion about the move at the Coast Guard meeting, ELLIOTT did not contact the Yacht Club about this move. After receipt of *The Lubberline* and actual notice of the move when he visited the boathouse, WOODWORTH did not contact the Yacht Club either.

QUESTIONS PRESENTED

1. Was the Court correct in enforcing the indemnity provisions adopted as regulations and conditions of membership in the Yacht Club against WOODWORTH, who actually signed instruments containing the provision, and against ELLIOTT, who accepted the provision as a condition of membership, although there is no written evidence of his signing the instruments?

2. Was the Court correct in finding that the area of the basin in which Mojean operated a public float was a part of the premises of the Yacht Club?

3. Was the Court correct in finding that the boathouse was moved without permission or authority?

4. Was the Court correct in finding WOODWORTH and ELLIOTT free of negligence themselves?

SUMMARY OF ARGUMENT

The Appellee submits that the indemnity provisions of the Yacht Club's conditions for membership are a valid and enforceable exculpatory clause, in this particular relationship, that between a non-profit corporation and its members. It serves a valid and necessary function, and, in effect, serves to make the members self-insurers to reduce the expenses of operation of the club. The Appellee further submits that the "premises" as between the Yacht Club and its members, included its entire leased area with the public dock area.

The Appellee urges also that the Appellants should not recover, even though the Court should invalidate the indemnity regulations, for the reason that both Appellants had notice of the boathouse move, impliedly consented to it, did nothing to direct the Yacht Club about a preferred moorage, and finally, actually saw, through the partner, WOODWORTH, the boathouse with its moorings before the accident when the storm was already beginning.

Either because of the indemnity provisions, or the equal fault of the Appellants in not caring for their boathouse, with notice of the moorings and the weather, the Courts' decision should be affirmed.

THE VALIDITY OF THE INDEMNITY REGULATION OR CONDITION

As a private, non-profit wharfinger, the respondent can place whatever conditions it desires on membership and a member's privilege of using its facilities. These conditions are determined by the contract, express or implied, between the parties. The libelants are bound by the provisions for membership and wharfage agreement, and assume all risk of damage to their property resulting from even the negligence, if any, of the respondent.

56 Am. Jur. "Wharves" Section 15, page 1075:

> "Rights, duties, and liabilities in respect of wharfage services and accommodations may depend upon or be affected by the character or status of the wharf as public or private . . . If private, the owner has the right to the exclusive use and enjoyment thereof, or to permit such other persons to enjoy it, and upon such terms, as he thinks proper, the rights of the parties being ordinarily dependent upon and governed by contract, express or implied."

38 Am. Jur., "Negligence", Section 8, page 649:

> "A contract exempting a person from liability for future negligent acts is subject to the objection that it tends to induce a want of care, and such agreements are often declared invalid on the grounds of public policy. Much depends upon the positions of the contracting parties. If they do not stand on a footing of equality, so that one is compelled to submit to a stipulation relieving the other from liability for future negligence, the stipulation is invalid. Again, much depends upon the

nature of the duty involved. No person can by contract relieve himself of a duty imposed upon him by law for the benefit of the public independently of the contract. On the other hand, situations may exist where the relationship of the parties is such as to compel recognition of the validity of a contract limiting liability for negligence. In fact, it is said that contracts against liability for negligence are valid except in those cases where a public interest is involved."

38 Am. Jur., "Negligence", Section 8, 1964 Cum. Supp., page 56, 175 ALR 8:

> "When it comes to the question of measuring the relative bargaining power of the parties no definite rules exist to guide the courts. While never referred to expressly, two factors seem to be outstanding as of primary consequence: the importance which the subject matter of the contract has for the physical or economic well-being of the party agreeing to release the other party from liability for the latter's negligence, measured not in terms of individual but of class importance, and the existence and extent of competition among the group to which the party to be exempted by the clause belongs, measured by the amount of free choice the party can actually exercise who is to agree to the exemption."

Griffiths v. Henry Broderick, Inc., 27 Wn.(2d) 901 (1947).

Since there is no public right or duty involved here, the bargaining positions of the parties are equal, and the contractual exemption of liability is for the benefit of all of the members, the conditions of wharfage set forth in the application and wharfage agreement should preclude the libelants from recovery.

The Washington Court is one jurisdiction which upholds the validity of indemnity agreements or exculpatory provisions in such contracts; in fact, the trend of modern decisions is to broaden the areas of validity of these agreements, rather than restrict them.

> "According to the great weight of modern authority, the parties to indemnity contracts may validly bind themselves by contract to indemnify the indemnitee against or relieve from liability on account of his own future acts. Some of the courts in reaching this result stress the analogy between these contracts and insurance policies, especially automobile insurance policies, or liability statutes, while others reach the same result independently, as by referring to the principle of freedom of contract, or by simply stating that such contracts do not violate public policy. Again the contention that such contracts are an inducement to negligence has been rejected 'fanciful', and untenable in view of the many automobile liability insurance policies in existence."

27 Am. Jur., "Indemnity", Section 9, 1964 Supp., page 161.

The State of Washington is in accord with this view. The leading case in Washington, the subject of an annotation in 175 ALR 8, dealt with the following indemnity provision in a management contract between a property owner and a management agent:

> ". . . And I further agree to save and hold Henry Broderick, Inc., harmless of and from any and all loss, damage or injury to any person or persons whomsoever, or property, arising from any cause or for any reason whatsoever in or about said premises."

Griffiths v. Henry Broderick, Inc., 27 Wn.(2d) 901 (1947).

In considering the contentions of the property owner that the provision did not exculpate the manager from its own negligence, because the word was not specifically mentioned, and that the provisions were void as against public policy, the Court stated:

> "In our opinion, there can be no doubt but that a loss, damage or injury occasioned by negligence is clearly within the . . . language of the indemnity provision . . ."

Griffiths v. Henry Broderick, Inc., supra, page 906.

With reference to the provision being against public policy, the Court gives a thorough and detailed analysis of the theory of such provisions and concludes that such a provision is valid and enforceable. As a basis for upholding such contractual provisions, the Court stated:

> "The basis of the broad rules prevailing in some jurisdictions, that one cannot validly contract for indemnity for the consequences of his own negligence, is the theory that the inevitable tendency of such a contract is to promote negligence, or, concretely to apply the rule to the instant case, it is contended that the contract involved here would inevitably tend to make Henry Broderick, Inc., less careful than it would have been had the contract not contained the indemnity provision. Hence, it is asserted that the indemnity provision is invalid.
>
> "It must become apparent, upon reflection, that the theory upon which the rule is based is

not recognized in many analogous situations. For example, thousands upon thousands of trucks and automobiles are continually operating upon our streets and highways whose owners have indemnity contracts as to injuries which they may negligently inflict upon the person or property of the members of the public. Many automobile owners hold such contracts protecting them from the results of their own negligence, up to twenty-five thousand dollars with respect to the injury of one person, and fifty thousand dollars as to persons injured in any one accident. They have contracted for full indemnity against injuries caused by their own negligence, and the validity of such contracts is unquestioned.

"In the case of *Northern Pac. R. Co. v. Thornton Bros. Co.*, 206 Minn. 193, 288 N.W. 226, wherein a contractor agreed to indemnify a railroad against any liability it might incur from damages to third persons as a consequence of its own negligence, the Supreme Court of Minnesota, in holding the contract valid, said:

> 'Quite fanciful is the suggestion that to hold as we do is " 'to put a premium on negligence rather than to discourage it.' " See note, 23 Virginia L. Rev. 85, 86 . . .'
>
> 'Neither law nor public policy prevents the ordinary contractor from buying from a third party indemnity from the pecuniary result of his own negligence. *That is legitimate as insurance. How does the same process, with identical result, become illicit simply because they are those of the original and basic contract rather than a collateral one for conventional insurance?* See 19 Minn. L. Rev. 471; 22 Id. 107'."
> (Italics theirs).

Griffiths v. Broderick, Inc., supra, pp. 907-908.

The respondent contends that both libelants are subject to the exculpatory provisions of the conditions of membership in the Yacht Club, and should be denied recovery in this action on the grounds that the respondent is a private wharfinger, not a professional bailee, and can set any legally valid conditions upon membership and use of the club facilities.

The respondent is a non-profit corporation set up for recreational and social objectives. Its wharfage rate is approximately one-third lower than public facility rates because of the non-profit objective and the low insurance rates afforded by the indemnity agreement. Its By-Laws provide that membership extends privileges to members subject to the rules and regulations of the Board of Trustees. Its rules and regulations set forth in the membership application, and wharfage agreement provide as follows:

> "As partial consideration for membership applied for, I hereby agree that I will save the Tacoma Yacht Club harmless from any and all liability in the event of damage and/or loss of any kind or description whatsoever to my boat or other equipment while the same is moored and/or located upon the premises of the said yacht club . . ." (Application form).
>
> "The member occupying the berth must provide and maintain adequate mooring lines and see that the boat is securely moored. If this is not complied with, the port captain may have the condition corrected at the member's expense." (Application for Moorage form, provision No. 14).
>
> "In case of emergency or disaster threatening injury to persons or property, any employee or

member of the club present is authorized to take such steps as may be deemed necessary to meet such emergency or disaster, and no liability therefor shall be incurred by the club, or the individual concerned." (Application for Moorage form, provision No. 16).

"The responsibility for the care and safety of my boat shall be upon myself at all times, and no action of or service by any employee or officer of the club shall in any way be construed as an acceptance by the club of any such responsibility." (Application for Moorage form, concluding recital).

The actual moorage agreement with its rules and regulations promulgated by the Board of Trustees contains provisions of like nature which the libelants as members of the club are bound by. The regular notice of December, 1961, that boathouses in the area were to be moved, gave the libelants sufficient notice to move the boat or let it be moved at their risk.

The rules supporting the contention of the respondent that the rules and regulations of the respondent are valid and should be enforced against both libelants are as follows:

"Indemnity springs from a contract, express or implied. It may be oral . . . when the requisite intention appears, no particular form of agreemen is necessary."

27 Am. Jur., "Indemnity", Section 6, page 458.

"The question of construction is usually one of law for the court applying recognized rules of construction. The cardinal rule is to ascertain

> the intentions of the parties and to give effect to that intention if it can be done consistently with legal principles."
>
> 27 Am. Jur., "Indemnity", Section 13, page 462.

Washington law applies to the construction of the contractual relations of those parties.

Air Transport Assoc. v. U.S., 221 F.(2d) 467 (1955).

"Negligence" as a specific item of the contract need not be set forth in the indemnity provision.

Griffiths v. Henry Broderick, Inc., supra.

It is significant that the cases cited by the libelants are those involving public wharfingers, professional bailees, or contracts for profit (repair or towage). It is well accepted that exculpatory provisions in such contracts are void as contrary to public policy, but we have here a private, non-commercial arrangement for lease of moorage space, to take advantage of which the applicants agree to be, in effect, self-insurers, even against the negligence of the landlord. The indemnity provisions here are similar to those in the *Griffiths v. Broderick* case. Situations analogous to this have from time to time been upheld by the courts in recent cases. Witness the following:

Union Pacific Railroad Co. v. Ross Transfer Company, 64 Wn. Dec. 2d p. 497 (1964); *Fire Association of Philadelphia v. Allis Chalmers Manufacturing Co.*,

120 F. Supp. 335 (1955); *Rice v. Pennsylvania R. Co.*, 202 F.(2d) 861 (1953); *Jacksonville Terminal Co. v. Railway Express Agency*, 296 F.(2d) 256 (1962); *Tidewater Field Warehouses v. Fred Whitaker Co.*, 370 Pa. 538, 88 A.(2d) 796 (1952); *General Accident, Fire and Life Assur. Corp. v. Smith and Oby Co.*, (CA 6 Ohio) 272 P.(2d) 581, 77 ALR 2d 1134, 1142 (1959).

Since we have here a private wharfinger whose relations with its members are governed by contract, express or implied, there is no public interest involved, and the members voluntarily accept membership in a non-profit corporation—subject as the By-Laws recite to its rules and regulations—this case falls within the principles of law set forth in the *Griffiths v. Broderick* case, supra. The exculpatory provisions promulgated by the Board of Trustees as conditions of membership should be enforced against the libelants and they should be denied recovery in this action.

THE LOCATION OF THE DAMAGE: PREMISES

Appellants' argument that the damage occurred away from the "premises" because the boathouse broke up in the bay is specious, and fails to consider a fundamental principle of law that the place of the wrong is the situs of a tort action. In a recent case this argument was used by an insurer to deny liability for wrongful death under a provision excluding coverage while the insured's watercraft was away from the "premises". The Court held that under a general liability

policy excluding from coverage accidents occurring while the insured watercraft was away from the assured's premises, the insurer would be liable for wrongful death sustained when the watercraft capsized several miles away from the assured's premises since the dispatching of the watercraft by the assured, despite adverse weather warnings, caused the accident; the wrongful act is the deciding factor—not the place where the actual damage occurred.

Amer. Emp. Ins. Co. v. Goble Aircraft Specialties, 131 NYS 2d 393, 205 Misc. 1066, withdrawn 154 NYS 2d 835, 1 A.D. 2d 2008.

The objective in the construction of a provision such as this is to determine the intent of the parties, just as it is in any other contract.

> "The actual intent and meaning at the time of executing the indemnity agreement must be deduced from the entire contract, the subject matter, the purpose of execution and the surrounding circumstances. Words in a contract of indemnity are given an ordinary meaning."
>
> *Keystone Tankship Corp. v. Willamette Iron & Steel Co.*, 222 F. Supp. 320 (1963).
>
> "Indemnity agreements should not be given an unduly liberal or harshly strict construction, but a fair construction that will accomplish its stated purpose."
>
> *Chicago, Minneapolis, St. Paul & Pacific Railroad Co. v. Famous Brands, Inc.*, 324 F. 2d 137 (1963).

In applying these rules of construction to the exculpatory provisions in this contract and directing attention to the argument of the libelants that the damage here occurred off the premises owned by the Yacht Club, we believe that the Court's finding that the premises as used in this contract includes the Mojean dock area is correct.

> "The word 'premises' as used in leases has a varied meaning depending upon the context and object to which it is applied and the Court, after considering the language of the instrument itself, considers the nature of the building and surrounding property and general purposes of the parties in order to determine what constitutes the premises."

Jackson v. Birgfeld, 56 A. 2d 793.

It is well established in the law that the possession of a subtenant is the possession of the lessor.

51 C.J.S., *Landlord and Tenant,* Sec. 254, p. 893.

Between Mojean and the respondent in the proper case, the question of a strict demarcation between Mojean's premises and the respondent's premises could be raised, but as between the respondent and the libelants, the premises are those which are owned by the respondent. There is no question but that the intent of the parties to this membership and wharfage contract was to include the leased area described by the Court in Paragraph V of its Findings of Fact.

BAILMENT AND CONVERSION

The Appellee assigns error to the Court's Finding that the Appellants did not authorize nor did they have notice of the Yacht Club's changing the moorage of their boathouse (R-58). Set forth in the Counter Statement of the Case are facts upon which the Court should have found that the Appellants had the usual and customary notice of events affecting their property. Both received the *Lubberline* notice; ELLIOTT discussed the move at the Coast Guard meeting prior to the move; WOODWORTH saw the boat and moorings the day before the accident. All of these facts were undisputed and uncontradicted, and should have been sufficient for the Court to find implied, if not actual, notice. Based upon these facts, the Yacht Club had permission through a condition or provision contained in the Moorage Agreement, as follows:

> "In case of emergency or disaster threatening injury to persons or property, any employee or member of the club present is authorized to take such steps as may be deemed necessary to meet such emergency or disaster, and no liability therefor shall be incurred by the club." (Wharfage Agreement) (R-38 Ex. 3).

Under these facts there was no conversion. The respondent by moving the boathouse acted in accordance with its contractual agreement with the libelants and merely continued its custody of the boathouse in attempting to keep it from becoming damaged from the construction of piling. At the most, the respondent became a bailee of the boathouse for the purpose of

its move. This argument again supports the finding of the Court that respondents were negligent, but does not create a relationship that exempts the libelants from the application of the indemnity provisions. This would not make the respondent a professional bailee analogous to a wharfinger which served the general public. The respondent remains a private wharfinger whose relationships with its members continued to be governed by the contract.

APPELLANTS' NEGLIGENCE

The Appellee assigns error to the Court's finding that WOODWORTH is excused from his notice of the moorings and danger from the rising wind by his lack of boating experience.

WOODWORTH was aware of the coming storm. (Tr. 45, L. 6-11) (Tr. 46, L. 6-9). He saw the mooring lines on the boathouse. (Tr. 58, L. 4-7). He came in from fishing because it was rough. (Tr. 58, L.20-21). He doubted the adequacy of the mooring lines when he came in. (Tr. 59, L. 8) (Tr. 61, L. 12-16). He felt when he saw the moorings that the railings were inadequate to moor the boathouse. (Tr. 62, L. 11-14) (Tr. 63, L. 12-18) (Tr. 64-65). He testified that the moorings were inadequate. (Tr. 65, L. 21-22). WOODWORTH did nothing to insure the adequacy of these moorings.

As a partner of ELLIOTT, WOODWORTH's notice of the danger was notice to ELLIOTT.

R.C.W. 25.04.090. Partner is an agent of the partnership for partnership business.

R.C.W. 25.04.120:

"*Partnership charged with knowledge of or notice to Partner.* Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of fraud on the partnership committed by or with the consent of that partner."

The Appellee contends that the Lower Court's decision should be affirmed, either because of the operation of the indemnity provisions of the membership regulations, or because the Appellants were equally at fault in having notice of the danger and failing to act diligently to protect their own property.

Respectfully submitted,

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